

KENDRICK J. HAFEN

ATTORNEY AT LAW

P.O. BOX 1902  
ST. GEORGE, UT 84771

(801) 634-0244

June 24, 1991

Robert L. Morgan, P.E.  
Utah State Engineer  
Division of Water Rights  
1636 West North Temple  
Salt Lake City, UT 84116

Re: Distribution of Pinto Creek Waters

Dear Mr. Morgan:

At the May 23, 1991 hearing called as a result of Mr. Thorpe Waddingham's April 24, 1991 letter, you requested that interested parties submit comments regarding the proposed distribution of Pinto Creek waters pursuant to the July 16, 1962 Stipulation, hereinafter referred to as the "Stipulation." Pinto Irrigation Company submits the following comments in opposition to the distribution of Pinto Creek waters pursuant to the Stipulation.

I.

**STATEMENT OF MATERIAL FACTS**

1. The community of Pinto is located in northern Washington County, Utah. It was first settled and water use commenced in 1860.

2. The community of Newcastle is located approximately 12 miles north of Pinto in Iron County, Utah. It was first settled about the turn of the century.

3. Pinto Irrigation Company's water rights are based upon the application of water to beneficial use prior to 1903. These rights are set out in the proposed determination for this area as Water User's Claims 71-2192, 71-1687, 71-2191 and 71-2190. These claims, among other things, set out Pinto Irrigation Company's

water rights for irrigation as:

- a) a primary flow of 4.0 cfs, and a high water flow of 6.0 cfs;
- b) a priority of 1860;
- c) beneficial use for irrigation limited to the irrigation requirements of 197.96 acres;
- d) a period of use from March 15-November 1.

4. Newcastle Reservoir Company claims among other water rights, a water right based upon Water User's Claim 71-405. This claim as described in the proposed determination for the area is based upon the application of water to beneficial use prior to 1903 and describes a water right with:

- a) a maximum flow of 4.0 cfs;
- b) a period of use during each alternate week from May 1 to September 30, both inclusive, with the first week of use beginning May 1;
- c) a priority of 1860;
- d) beneficial use for irrigation limited to 1,213.89 ac. ft. (303.47 ac based upon 4 acre feet per acre).

5. A note on the first page of Claim 71-405 indicates this "Right was transferred in 1917 from original points of diversion on Pinto Creek to East Side Canal and Diagonal Canal, covers transferred portion of diligence right established by Pinto Town users on the Pinto Fields."

6. No recorded conveyance of water rights from owners of lands in Pinto to Newcastle Reservoir Company or any of its predecessors in interest has been recorded in the Washington County Recorder's Office.

7. No change applications were filed by Newcastle Reservoir Company or its predecessors in interest with or approved by the state engineer changing the point of diversion or place of use from lands in Pinto to the Newcastle area. On July 12, 1955

Newcastle Reservoir Company filed Group Change Applications 3020, 3021, 3022, 3024-3032 for a change in point of diversion to store waters in Newcastle Reservoir.

8. Pinto Creek waters have not been administered pursuant to the Stipulation since the irrigation season following its execution approximately 29 years ago.

II.

**NEWCASTLE HAS NO WATER RIGHT THAT WOULD ENTITLE  
IT TO A DISTRIBUTION OF PINTO CREEK WATERS  
ON PAR WITH PINTO WATER RIGHTS**

Pinto Irrigation Company assumes that Water User's Claim 71-405 is the basis upon which Newcastle Reservoir Company claims a water right that is equal in flow and priority to Pinto Irrigation Company's water rights and is thus the basis for Newcastle Reservoir Company's purported entitlement to the alternate week flow of Pinto Creek described in the Stipulation. However, under close scrutiny Claim 71-405 is not a diligence right with an 1860 priority, but, at most, a new appropriation of water initiated in 1917.

Pinto Irrigation Company's rights describe 197.96 irrigated acres as the basis for its diligence claim for irrigation. These irrigated acres are located as follows: 26.2 acs. in SW $\frac{1}{4}$  section 27, and 150.5 acs. in various quarter sections of section 34, T37S, R15W; 21.9 acs. in lot 4 and 2.1 ac in lot 5, section 2, T38S, R15W. This irrigated acreage is documented by the hydrographic survey accompanying the Proposed Determination. Paragraph 9(k) of Claim 71-405 describes the irrigated acreage upon which the claim is based as 197.96 acres in Lots 11, 12, 13 in section 2, T38S, R15W; section 34, T37S, R15W and SW $\frac{1}{4}$  section 27, T37S, R15W. The hydrographic survey indicates that the irrigated acreage upon which Claim 71-405 is based is already used as the basis for the claims of Pinto Irrigation Company or

by other individuals. The real issue is who can establish the better claim to water use on the acreage irrigated. Pinto argues that its claim is the strongest based upon the following.

First, the hydrographic survey establishes that at the time it was prepared the lands were irrigated under the Pinto Irrigation Company rights or rights of others. The hydrographic survey was prepared by individuals in the state engineer's office. These individuals are trained and have expertise in identifying and mapping water uses and researching their origin and should be accorded a presumption of validity.

Second, Claim 71-405 is based upon an alleged "transfer" of water rights occurring in 1917. The note on Claim 71-405 describing the "transfer" states, "Right was transferred in 1917 from original points of diversion on Pinto Creek to East Side Canal and Diagonal Canal, covers transferred portion of diligence right established by Pinto Town users on the Pinto Fields." This note does not state whether the "transfer" was a conveyance of title or a change in the point of diversion and place of use; it does not identify the individuals making the conveyance or changing the point of diversion and place of use; nor does it identify the individuals to whom the "transfer" was made, although Desert [sic] Reclamation Company is presumed to be that individual because it is making the claim. Even if the alleged "transfer" was clear it would be ineffective because the "transfer," whether a conveyance of title or a change in point of diversion and place of use, to be effective must meet certain statutory requirements. As explained below these statutory requirements have not been met.

Beginning in 1903 the laws of Utah have required that: "Water rights shall be transferred by deeds, in substantially the

same manner as real estate<sup>1</sup> . . . Every deed of water right within this State hereafter made, which shall not be recorded as provided in this act, shall be void as against any subsequent purchaser, in good faith, and for a valuable consideration, of the same water right, or any portion thereof, where his own deed shall be first duly recorded."<sup>2</sup> Further, "a right to the use of water appurtenant to the land shall pass to the grantee of such land, . . . provided, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance, by making such reservation in express terms inserted in such conveyance, or may be separately conveyed."<sup>3</sup> These laws have been in existence from their enactment in 1903 to the present time. Therefore, in order for any conveyance of title to be valid against any subsequent purchaser, a deed conveying title must be recorded. Pinto has made a diligent search of the Washington County Recorder's records at the approximate time the note on Claim 71-405 indicates the transfer was made. No conveyance of water rights or reservation of water rights was found. Therefore, the title to waters described under Claim 71-405 were never conveyed from the original users at Pinto to Newcastle Reservoir Company or its predecessors in interest pursuant to Utah statutes.

Since 1909 a change in place of diversion of water rights must have the prior approval of the state engineer.<sup>4</sup> The alleged "transfer" took place in 1917 and is therefore subject to the requirement of this statute. No application to change the point

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<sup>1</sup>Laws of Utah 1903, chapter 100, Section 61, p. 104.

<sup>2</sup>Laws of Utah 1903, chapter 100, section 62, p. 104.

<sup>3</sup>Laws of Utah 1903, chapter 100, section 60, p. 104.

<sup>4</sup>Laws of Utah 1909, chapter 62, 1288x24, p.90-91.

of diversion of any Pinto Creek waters here involved was made prior to July 12, 1955 when Group Change Applications 3020, 3021, 3022, 3024-3032 were filed by Newcastle Reservoir Company for a change in point of diversion to store waters in Newcastle Reservoir. Therefore, any "transfer" of water made by the owners of the rights in 1917 amounting to a change in point of diversion or place of use was not valid.

In summary, while Claim 71-405 appears to establish an 1860 diligence right on its face, the hydrographic survey establishes that the irrigated acreage upon which it is based is basically a duplication of the irrigated acreage used to establish the Pinto Irrigation Company's claims and other third party claims. Pinto Irrigation Company's claims should be given priority over Newcastle because Pinto Irrigation Company's use is verified in the hydrographic survey while Newcastle Reservoir Company's use is merely a statement with no other verification. Further, the "transfer" upon which Newcastle bases its claim is invalid as: (1) a conveyance of title because the conveyance, if any, was not recorded; (2) a change in point of diversion and place of use, because it was not filed with or approved by the state engineer. Newcastle Reservoir Company therefore has no water right that would entitle it to a distribution of Pinto Creek waters on par with Pinto Irrigation Company's water rights.

### III.

#### **IN THE EVENT 71-405 IS DETERMINED TO BE VALID, NEWCASTLE HAS FORFEITED ALL RIGHTS UNDER THIS CLAIM**

Assuming for argument only that Newcastle can provide sufficient documentation to establish an 1860 diligence right to 4 cfs from Pinto Creek under Claim 71-405, the state engineer still should not administer the alternate week distribution of Pinto Creek waters between Pinto and Newcastle pursuant to the

Stipulation. The basis of this argument is that Newcastle has forfeited any water right it may have under Claim 71-405 as a result of its nonuse of this right for a period in excess of five years.

Section 73-1-4(1), Utah Code Annotated 1953, as amended, states that when an appropriator of water ceases to use his water for a period of five years, the right ceases unless the appropriator files an application to extend the period of nonuse with the state engineer. It is undisputed that after an initial attempt to administer the Pinto Creek waters pursuant to the Stipulation that the use of Pinto Creek waters has not been alternated between Pinto and Newcastle during the period from May 1 to September 30. Nearly 30 years have elapsed since this attempt. Newcastle's nonuse of this water right for the statutory period of five years without filing an application to extend its nonuse has resulted in the forfeiture of any right Newcastle Irrigation Company has under Claim 71-405.

IV.  
**PRACTICAL ADMINISTRATION PROBLEMS PRECLUDE  
ADMINISTRATION OF PINTO CREEK WATERS  
PURSUANT TO THE STIPULATION**

Distribution under the Stipulation was apparently attempted immediately after its execution and found to be unworkable. From conversations with Pinto stockholders, the problems with implementation appear to be associated with decreased return flows from the meadows to the creek because of the two week absence of water from the meadows under administration of the Stipulation. This reduction of return flow adversely affects the quantity of water available to the canyon users and to Newcastle Reservoir Company. Under the present administration of waters, when the flow at Pinto Irrigation Company's diversions decrease below its primary rights all of the Pinto Creek waters are

diverted by Pinto Irrigation Company. Because of the retained bank storage along the Creek and the constant replenishment of this storage through irrigation, return flows occur to the creek along its course through the Pinto meadows. The result is that a greater flow of water is available in the creek as it exits the Pinto meadows than is diverted by Pinto at its point of diversion. This increased flow is available to the canyon users and Newcastle Reservoir Company each and every week. With administration of water pursuant to the Stipulation this return flow will likely be non existent or at least greatly diminished.

**V.  
CONCLUSION**

Pinto's position is that the waters of Pinto Creek should not be administered pursuant to the Stipulation. This position is supported by what appears to be a duplication of the irrigated acreage claimed by Pinto Irrigation Company and other third parties under their respective water user's claims and Newcastle Reservoir Company's Claim 71-405. Pinto and the third parties' acreage claims are supported by the hydrographic survey, Newcastle's claim is not. Claim 71-405 is based upon a purported "transfer" of water. This "transfer" is ambiguous because it does not identify the "transfer" as a conveyance of title or a change in point of diversion and place of use, nor does it identify the transferror or transferee. Further, the "transfer" does not comply with the statutory requirements governing the recording of water rights title conveyances or change applications. Even if Newcastle can, through some showing, establish Claim 71-405's validity, the right has been forfeited through five years of nonuse. Therefore, the Pinto Creek waters should not be administered to recognize Newcastle Reservoir Company's water right under Claim 71-405. Notwithstanding Pinto Irrigation



Company's position that Pinto Creek waters should not be administered pursuant to the Stipulation, Pinto Irrigation Company is willing to negotiate, including the possibility of modifying its flow rates and priorities, to reach a satisfactory resolution of the distribution of Pinto Creek waters.

Separate from Newcastle's claim to have Pinto Creek water administered pursuant to the Stipulation, Newcastle complains that it does not receive the waters from the Santa Clara drainage that are imported into Pinto Creek through the Grass Valley tunnel. The major cause of this complaint is that Newcastle has not installed measuring devices so a correct distribution of the waters can be made. While the USGS maintains a gaging station near the outlet of the tunnel, the river commissioner is unable to measure the flows at this point. Without this or some other measurement the waters cannot be distributed pursuant to the various rights. Newcastle should be required to establish and maintain a measuring device at the outlet of the tunnel and an additional measuring device immediately below Pinto Irrigation Company's last diversion structure so that allocations of water can be made and records kept. The costs associated with establishing and maintaining these two devices should be the sole responsibility of Newcastle because it is importing foreign water and, but for this importation, these devices would not be required. These measuring devices will also serve the purpose of monitoring Newcastle's diversions from Grass Valley so that their diversion right will not be exceeded. An additional measuring device should also be installed near Pinto Creek's discharge into Newcastle Reservoir in order to record flows from the Creek entering the Reservoir. Pinto Irrigation Company has established and maintains a measuring device at each of its diversions so that its diversions may be monitored by the river commissioner. While Pinto Irrigation Company recognizes Newcastle's apparent

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legal right to its transbasin diversion from the Santa Clara River, Pinto Irrigation Company intends to pursue its legal remedies for damage to lands and the natural channel occurring as a result of Newcastle's transbasin diversions.

Pinto Irrigation Company looks forward to your favorable determination in this matter.

Very truly yours,

  
Kendrick J. Hafen

pc: Pinto Irrigation Company  
Thorpe Waddingham, Esq.